Mohamad Ezam bin Mohd Nor & Ors v Menteri Dalam Negeri & Anor

HIGH COURT (IPOH) — CRIMINAL APPLICATION NO 44–80 OF 2002
BALIA YUSOF JC
24 MARCH 2003

Civil Procedure *— Declaration — Application for — Application for declaration that r 81(5) of the Internal Security (Detained Persons) Rules 1960 was ultra vires art 5(3) of Federal Constitution — Application for declaration that applicants entitled to consult their counsel in private without any interference — Whether O 53 of the Rules of the High Court 1980 applicable — Whether leave of court had to be obtained first*

Constitutional Law *— Fundamental liberties — Personal liberty — Numerous consultations accorded to the applicants with their respective counsels — Whether art 5(3) of Federal Constitution breached — Whether right to consult legal advisers had been made ineffective or illusory*

Preventive Detention *— Detention order — Detention under Internal Security Act — Application for declaration that r 81(5) of the Internal Security (Detained Persons) Rules 1960 was ultra vires art 5(3) of the Federal Constitution — Application for declaration that applicants entitled to consult their counsel in private without any interference — Whether r 81(5) of the Internal Security (Detained Persons) Rules 1960 was ultra vires art 5(3) of the Federal Constitution — Whether right to consult legal advisers had been made ineffective or illusory by presence of superintendent or officer*

Statutory Interpretation *— Construction of statutes — Literal approach — Plain meaning of words — Interpretation of r 81(5) of Internal Security (Detained Persons) Rules 1960 — Whether r 81(5) applicable to visits by legal advisers*

The five applicants were arrested and charged for an offence under s 27(5)(a) of the Police Act 1967 ('the Police Act') at the Kuala Lumpur Magistrates' Court. The applicants were then held under detention at the Tempat Tahanan Perlindungan Taiping under s 8 of the Internal Security Act 1960 ('the Act') through orders made by the Minister of Home Affairs. In this application, the applicants sought, inter alia: (a) a declaration that r 81(5) of the Internal Security (Detained Persons) Rules 1960 ('the Rules') was ultra vires art 5(3) of the Federal Constitution ('the Constitution'); and (b) a declaration that the applicants were entitled to consult their counsel in private without any restriction and/or interference. For such consultations to be effective, the applicants submitted that they must be free from any form of interference and the applicants' contention was that the consultation with the presence and within the hearing of the officers from the detention center made such right illusory. At the commencement of the hearing of this application, the senior federal counsel, appearing for the respondents, put up a preliminary objection contending that since the reliefs prayed for were declaratory in nature, O 53 r 3 of the Rules of the High Court 1980 ('the RHC') was applicable and leave of this court ought to be obtained first.

Held, dismissing the application:

(1) This was a criminal application and as such, O 53 of the RHC did not apply. The High Court has the power and jurisdiction to hear this application and accordingly, the respondents' preliminary objection was overruled (see p 371A, D).

(2) Rule 81(5) of the Rules which stipulated, inter alia, that 'a superintendent or an officer ... shall ... be in sight and hearing during the whole of any visit to a detained person unless the superintendent by an order in writing sees fit to dispense with any of the above requirements' was applicable to visits by legal advisers. Considering the plain meaning of the words used in r 81(5), there was no justification to hold that r 81(5) of the Rules should be limited to only visits other than visits by legal advisers as to do so would be importing words into the statute, which the High Court was not competent to do (see p 372D–G).

(3) Article 5(3) of the Constitution had not been breached as there were numerous consultations accorded to the applicants with their respective counsels. There was no justification in holding that the right to consult their legal advisers has been made ineffective or illusory. The numerous occasions of consultation that had been accorded to the applicants pointed to the fact that the applicants were actually pursuing their fundamental rights in accordance with the said art 5(3) of the Constitution (see pp 374B–C, 373D); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 and *Smt Maneka Ghandi v Union of India* AIR 1978 SC 597 followed.

(4) The applicants were never denied of their right to consult a legal practitioner of their choice. The applicants has failed to show that the respondents had deliberately and in bad faith obstructed them from exercising their rights under art 5(3) of the Constitution. On the contrary, the respondents by being present in sight and hearing during the visits to the detainee at the detention centre were merely exercising their statutory duty as provided for in the Rules (see p 374D–G).

(5) The provisions of r 81(5) of the Rules were couched in the form of certain curtailment to the right to communicate confidentially with a legal adviser and they were fashioned in clear and express words. The right of a detainee under art 5(3) of the Constitution was not without restrictions and such restrictions were made and only deemed necessary in balancing between the interest of the detainee and the interest of justice and to the public. Justice did not mean only for the accused, it also meant the interest of the State (see p 376E–F); *Hashim bin Saad v Yahya bin Hashim & Anor* [1977] 2 MLJ 116 followed.

(6) In construing r 81(5) of the Rules, it was outside the purview of the court's power to consider the harshness or the unjustness of the provisions of r 81(5). Rule 81 was made under the provisions

of s 8(4) of the Act 'for the discipline and interest of persons detained therein' and the Minister was empowered to make different rules for different places of detention (see p 376D–E); *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 followed.

(7) Principle 18 in the 'Body of Principles For the Protection of All Persons Under Any Form of Detention or Imprisonment', a document adopted by the United Nations General Assembly, was only declaratory in nature and was not legally binding on member States. In any event, principle 18(3) provided that certain suspension of rights may be imposed in certain circumstances to be specified by law or lawful regulations when it was considered indispensable by a judicial or other authority in order to maintain security and good order and r 81(5) of the Rules was in accord with this principle (see p 377F–G).

[Bahasa Malaysia summary

Kelima-lima orang pemohon telah ditangkap dan dituduh kerana satu kesalahan di bawah s 27(5)(a) Akta Polis 1967 ('Akta Polis tersebut') di dalam Mahkamah Majistret Kuala Lumpur. Pemohon-pemohon kemudiannya ditahan di Tempat Tahanan Perlindungan Taiping di bawah s 8 Akta Keselamatan Dalam Negeri 1960 ('Akta tersebut') melalui perintah-perintah yang dibuat oleh Menteri Dalam Negeri. Dalam permohonan ini, pemohon-pemohon telah memohon, antara lain: (a) satu deklarasi bahawa k 81(5) Kaedah-Kaedah Keselamatan Dalam Negeri (Orang Tahanan) 1960 ('Kaedah-Kaedah tersebut') adalah ultra vires perkara 5(3) Perlembagaan Persekutuan ('Perlembagaan tersebut'); dan (b) satu deklarasi bahawa pemohon-pemohon berhak untuk berunding dengan peguam mereka secara persendirian tanpa apa-apa sekatan dan/atau gangguan. Untuk perundingan tersebut berkesan, pemohon-pemohon menghujahkan bahawa mereka perlu bebas daripada apa-apa bentuk gangguan dan hujah pemohon-pemohon adalah bahawa perundingan dengan kehadiran dan dalam pendengaran pegawai-pegawai daripada pusat tahanan membuat hak sedemikian hanya satu ilusi. Pada permulaan perbicaraan permohonan ini, peguam kanan persekutuan, yang hadir bagi pihak responden-responden, telah membuat satu bantahan awal dengan menghujahkan bahawa memandangkan relif-relif yang dipohon bersifat deklaratori, A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah terpakai dan kebenaran mahkamah ini patut diperolehi terlebih dahulu.

Diputuskan, menolak permohonan tersebut:

(1) Ini adalah satu permohonan jenayah dan oleh demikian, A 53 KMT tidak terpakai. Mahkamah Tinggi mempunyai kuasa dan bidang kuasa untuk mendengar permohonan ini dan sewajarnya, bantahan awal responden-responden adalah ditolak (lihat ms 371A, D).

(2) Kaedah 81(5) Kaedah-Kaedah tersebut yang menetapkan, anatara lain, bahawa 'a superintendent or an officer ... shall ... be in sight and hearing during the whole of any visit to a detained person unless the superintendent by an order in writing sees fit to dispense with any of the above requirements' adalah terpakai kepada lawatan-lawatan oleh penasihat-penasihat undang-undang. Dengan mengambilkira maksud biasa perkataan-perkataan yang digunakan dalam k 81(5), tiada justifikasi untuk memutuskan k 81(5) Kaedah-Kaedah tersebut patut terbatas hanya kepada pelawat-pelawat selain daripada penasihat-penasihat undang-undang kerana dengan berbuat demikian akan membawa masuk perkataan-perkataan tersebut ke dalam statut, yang mana Mahkamah Tinggi tidak kompeten untuk berbuat demikian (lihat ms 372D–G).

(3) Perkara 5(3) Perlembagaan tersebut tidak dilanggar kerana terdapat pelbagai rundingan yang telah diperuntukkan untuk pemohon-pemohon tersebut dengan peguam-peguam masing-masing. Tiada bidang kuasa untuk memutuskan bahawa hak untuk berunding dengan penasihat-penasihat undang-undang mereka telah dibuat dengan tidak berkesan atau hanya secara ilusi. Beberapa masa rundingan yang telah diperuntukkan untuk pemohon-pemohon menunjukkan hakikat bahawa pemohon-pemohon sememangnya melaksanakan hak-hak asasi mereka menurut perkara 5(3) Perlembagaan tersebut (lihat ms 374B–C, 373D); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 dan *Smt Maneka Ghandi v Union of India* AIR 1978 SC 597 diikut.

(4) Pemohon-pemohon tidak pernah dinafikan hak mereka untuk berunding dengan pengamal undang-undang pilihan mereka. Pemohon-pemohon telah gagal untuk menunjukkan bahawa responden-responden telah dengan sengaja dan berniat jahat menghalang mereka daripada melaksanakan hak-hak mereka di bawah perkara 5(3) Perlembagaan tersebut. Sebaliknya, respoden-responden dengan berada dalam pandangan dan pendengaran semasa lawatan-lawatan peguam-peguam ke pusat tahanan untuk bertemu dengan orang tahanan hanya melaksanakan kewajipan statutori mereka sebagaimana yang diperuntukkan dalam Kaedah-Kaedah tersebut (lihat ms 374D–G).

(5) Peruntukan k 81(5) Kaedah-Kaedah tersebut telah dibuat sebagai suatu sekatan terhadap hak untuk berbincang secara sulit dengan penasihat-penasihat undang-undang dan ianya telah digubal dengan perkataan-perkataan yang jelas dan nyata. Hak seorang tahanan di bawah perkara 5(3) Perlembagaan tersebut tidak tanpa batasan dan batasan-batasan tersebut telah dibuat dan hanya dianggap perlu untuk mengimbangkan antara kepentingan orang tahanan dan kepentingan keadilan dan awam. Keadilan tidak bermakna hanya untuk tertuduh, ia juga bermaksud kepentingan

negara (lihat ms 375E–F); *Hashim bin Saad v Yahya bin Hashim & Anor* [1977] 2 MLJ 116 diikut. A

(6) Dalam 81(5) Kaedah-Kaedah tersebut, ia adalah di luar ruang lingkup kuasa mahkamah untuk menimbangkan ketegasan atau ketidakadilan peruntukan k 81(5). Kaedah 81 dibuat di bawah peruntukan s 8(4) Akta tersebut 'for the discipline and interest of persons detained therein' dan Menteri tersebut diberi kuasa untuk membuat peraturan-peraturan lain untuk tempat-tempat tahanan lain (lihat ms 376D–E); *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 diikut. B

(7) Prinsip 18 dalam 'Body of Principles For the Protection of All Persons Under Any Form of Detention or Imprisonment', satu dokumen yang digunakan oleh Perhimpunan Agung Bangsa-Bangsa Bersatu, adalah hanya bersifat deklaratori dan tidak mengikat negara-negara ahli di sisi undang-undang. Dalam apapun keadaan, prinsip 18(3) memperuntukkan bahawa penggantungan tertentu hak-hak boleh dikenakan dalam keadaan tertentu yang dispesifikasikan oleh undang-undang atau peraturan-peraturan yang sah jika ia dianggap amat diperlukan oleh satu pihak berkuasa keadilan atau mana-mana pihak berkuasa untuk menjamin keselamatan dan ketenteraman awam dan k 81(5) Kaedah-Kedah tersebut adalah bersesuaian dengan prinsip tersebut (lihat ms 377F–G).] C D E

Notes

For cases on application for declaration, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1947–1963.

For cases on detention under Internal Security Act, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1245–1246. F

For cases on personal liberty, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1584–1589.

For cases on literal approach, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1477–1499.

G

Cases referred to

Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30 (refd)

Chua Tian Chang v Ketua Polis Negara, Mahkamah Persekutuan (Bidang Kuasa Jenayah) Bil 05–10–2001 (W) (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 (folld) H

Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116 (folld)

Hishamudin bin Rais v Ketua Polis Negara, Mahkamah Persekutuan (Bidang Kuasa Jenayah) Bil 05–11–2001 (W) (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (folld)

Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356 (refd) I

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara, Mahkamah Persekutuan [2002] 4 MLJ 449 (refd)

Moti Bai v The State AIR 1954 Rajasthan 241 (refd)
Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 (refd)
PP v Zulkifflle bin Hassan [1990] 2 MLJ 215 (refd)
R v Secretary of State for the Home Department, ex parte Daly [2001] 3 All ER 433 (refd)
Ramli bin Salleh v Inspector Yahya bin Hashim [1973] 1 MLJ 54 (refd)
Saari bin Sungib v Ketua Polis Negara, Mahkamah Persekutuan (Bidang Kuasa Jenayah) Bil 05–12–2001 (W) (refd)
Smt Maneka Ghandi v Union of India AIR 1978 SC 597 (folld)
Sundar Singh v Emperor AIR 1930 Lahore 945 (refd)
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)
Teh Cheng Poh v PP [1978] 1 MLJ 30 (refd)
Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 MLJ 29 (refd)
United Malayan Banking Corporation v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)
Yap Peng Seng v Menteri Kementerian Sumber Manusia Malaysia [1998] 5 CLJ 804 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25
Federal Constitution art 5(3)
Indian Constitution art 22(1)
Internal Security Act 1960 s 8
Internal Security (Detained Persons) Rules 1960 r 81(5)
Police Act 1967 s 27(5)(a)
Rules of the High Court 1980 O 53 r 3

Malek Imtiaz Sarwar (*Malek Imtiaz Sarwar*) and *M Moganambal* (*R Sivarasa* with her) (*Daim & Gamany*) for the applicants.

Kamaluddin bin Mohd Said (Deputy Public Prosecutor) (Attorney General's Chamber) for the respondent.

Balia Yusof JC: The five applicants are currently held under detention at the Tempat Tahanan Perlindungan Taiping under s 8 of the Internal Security Act 1960 ('the Act') through orders made by the Minister of Home Affairs. The first, second and third applicants were originally detained by the police under s 73 of the said Act on 10 April 2001 while the fourth and fifth applicants were detained on 24 April 2001 and 20 April 2001 respectively. The detention orders under s 8 of the said Act on the first, second and third applicants are dated 2 June 2001 (exh ME 1 pp 1–19 encl 4) whereby the said applicants were detained for a period of two years effective from the said date while the detention orders in respect of the fourth and fifth applicants on the same terms were issued on 13 June 2001 (exh ME 1 pp 20–35 encl 4).

Between September 1999 and March 2000, the five applicants were, on different dates, arrested and charged for an offence under s 27(5)(a) of the

Police Act 1967 at the Kuala Lumpur Magistrates' Court. It is in respect of this criminal charge against each of the applicant that prompted them to file the present application seeking for the following reliefs: A

(1) Perintah bahawa peraturan 81(5) [Kaedah-Kaedah Keselamatan Dalam Negeri (Orang Tahanan) 1960] yang dibuat di bawah Akta Keselamatan Dalam Negeri 1960 adalah ultra vires kepada fasal 5(3) Perlembagaan Persekutuan; dan/atau B

(2) Perintah bahawa pemohon-pemohon adalah berhak untuk rundingcara secara sulit dan persendirian dengan peguam-peguam mereka tanpa sebarang sekatan/gangguan; dan/atau

(3) Perintah bahawa pemohon-pemohon berhak berunding dengan orang-orang selain daripada peguam-peguam mereka dalam keadaan sulit, persendirian dan tanpa sebarang sekatan/gangguan yang merupakan relevan kepada dan/ataupun perlu untuk persediaan pembelaan masing-masing dalam apa jua prosiding jenayah yang dimulakan terhadap mereka; dan/atau C

(4) Perintah bahawa pegawai yang menjaga ('PYM') Tempat Tahanan Perlindungan Taiping diarahkan supaya membenarkan pemohon-pemohon berunding dengan peguam-peguam mereka dalam keadaan sulit, persendirian dan tanpa sebarang sekatan/gangguan; dan/atau D

(5) Perintah bahawa PYM Tempat Tahanan Perlindungan Taiping diarahkan supaya membenarkan pemohon-pemohon berunding dengan orang-orang selain daripada peguam-peguam mereka dalam keadaan sulit, persendirian dan tanpa sebarang sekatan/gangguan yang merupakan relevan kepada dan/ataupun perlu untuk persediaan pembelaan masing-masing dalam semua prosiding jenayah yang dimulakan terhadap mereka termasuk kes-kes berikut: E
   (a) E 83–1276–2001 di Mahkamah Majistret 1B, Kuala Lumpur;
   (b) E 83–1277–2001 di Mahkamah Majistret 1B, Kuala Lumpur;
   (c) E 83–1278–2001 di Mahkamah Majistret 1B, Kuala Lumpur; F
   (d) E 83–1279–2001 di Mahkamah Majistret 1A, Kuala Lumpur;
   (e) E 83–1280–2001 di Mahkamah Majistret 1B, Kuaa Lumpur; dan
   (f) E 83–1281–2001 di Mahkamah Majistret 1B, Kuala Lumpur;

   dan/atau

(6) Perintah atau arahan lain yang selanjutnya difikirkan patut dibuat atau diberi oleh Mahkamah yang Mulia ini. G

This application was made by way of a notice of motion in the form of a criminal application supported by an affidavit jointly sworn by the five applicants (encl 3).

From the outset, at the commencement of the hearing of the said application En Kamaluddin Said, learned senior federal counsel appearing for the respondents put up a preliminary objection contending that the reliefs as prayed in the above prayers are declaratory in nature namely prayers 1, 2 and 3, while prayers 4 and 5 are actually in the form of a mandamus. It is the contention of the respondents that O 53 r 3 of the Rules of the High Court 1980 ('the RHC') applies and leave of this court ought to be obtained first (see *Yap Peng Seng v Menteri Kementerian Sumber Manusia Malaysia* [1998] 5 CLJ 804). The learned senior federal counsel H I

A further submitted that although this is a criminal application, in substance the reliefs sought for are civil in nature and therefore the provisions of the RHC should apply.

Learned counsel for the applicants on the other hand argued that being a criminal application, O 53 of the RHC does not apply. Enclosure 3 is the B proper form of application to be made and it is a mode of action which would normally apply in seeking reliefs of the kind prayed for in the said enclosure. In his further submission it was contended that s 25 of the Courts of Judicature Act 1964 must be given a liberal and wide interpretation and ought not to be confined to civil cases only. This court has such power and discretion to entertain this application and in the interest of justice this C application should not be struck out merely on procedural defect (see *Teh Cheng Poh v Public Prosecutor* [1978] 1 MLJ 30, *United Malayan Banking Corporation v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 and *Public Prosecutor v Zulkiffle bin Hassan* [1990] 2 MLJ 215).

Having considered the points raised by the parties and their respective D submissions, I am of the considered view that on the authorities aforesaid, there is no merit in the objection raised by the respondents and hold that this court has the power and jurisdiction to hear this application. The preliminary objection raised by the respondents was accordingly dismissed and parties were ordered to proceed on the merits of the application.

E On various occasions and at different dates, applications were made by the applicants' counsel for a right of access and to have consultation with the applicants in private. The said requests were denied by the Pegawai Yang Menjaga Tempat Tahanan Perlindungan Taiping except for a meeting on 21 June 2001 whereby the counsel was allowed to have consultation with the applicants in the presence of the officers from the detention center but not F within their hearing. As a result of this it was further alleged by the applicants that they were denied of their rights to instruct their counsel in full confidence and without any restriction. The applicants' joint affidavit also stated that they have jointly been charged in criminal cases in the Kuala Lumpur Magistrates' Court and there is a necessity that they should be allowed to consult their counsel together in order to enable them to prepare for their G defence against the said criminal charges. Such denial of their right to consult their counsel together and in private, in their contention, is a breach of their fundamental rights as enshrined in art 5(3) of the Federal Constitution ('the Federal Constitution').

The respondents contend that the applicants were never denied access H to their counsel and were never prevented from giving any instructions to their counsel. The respondents in the affidavit of the Pegawai Yang Menjaga Tempat Tahanan Perlindungan Taiping (encl 6) avers that there were instances when the applicants were given the opportunity to see their counsel in private and in groups and that there were many lawyers from various legal firms having consultations with the applicants. It is further I contended by the respondents that the action of the respondents were in accordance with established rules and procedures as provided for under the Internal Security (Detained Persons) Rules 1960 ('the Rules').

The main thrust of the applicants' contention in this application is that r 81(5) of the Rules is ultra vires art 5(3) of the Constitution which forms the very first prayer in this application and seeking this court to so declare. In their views, the applicants contend that they have the undeniable right to consult their counsel in private without any restriction and/or interference from any quarters. It is pertinent at this stage to reproduce r 81 of the Rules which provides as follows:

> (1) (a) A detained person shall, consistent with the proper discipline of the place of detention and subject as hereinafter provided, be entitled to visits from his relatives and legal adviser.
>
> (b) A detained person may, consistent with the proper discipline of the place of detention and subject as hereinafter provided, with the express permission of the Superintendent whose decision shall, subject to an appeal to the Officer-in-Charge, be final, receive visits from persons other than his relatives and legal adviser.
>
> (2) No detained person shall, except with the express permission of the Superintendent, receive more than one visit a week.
>
> (3) Not more than two persons shall be admitted to visit a detained person at any one time.
>
> (4) No visit shall last more than 30 minutes.
>
> (5) A Superintendent or an officer, or in the case of a visit to a female, a wardress, shall, together with an interpreter in any case where such officer does not understand the language spoken, be in sight and hearing during the whole of any visit to a detained person unless the Superintendent by an order in writing sees fit to dispense with any of the above requirements.

Before me, it is submitted that the abovementioned rule has no application to visits by counsel of the detained persons and it is a general rule governing visitation rights. Visits by legal advisers must be deemed to be excluded. It is further alluded by counsel for the applicants that art 5(3) of the Constitution should be given a liberal interpretation and a broad meaning. Using the normal principles in the cannons of interpretations, I found no merit in the applicants' argument that r 81(5) should not be applicable to visits by legal advisers. Considering the plain meaning of the words used in the abovementioned rule, I find no justification to hold that the said rule should be limited to only visits other than visits by legal advisers. To do so would in my view be importing words into the statute, a venture which this court is not competent to do. At the same time I am of the view that to exclude visits by legal advisers, despite the clear words in the said rule would be doing violence to the same. The said rule also gives a discretion to the superintendent, in appropriate cases, to dispense with any of the requirements mentioned therein in writing. On the evidence available before me from the affidavits filed by both the applicants and the Pegawai Yang Menjaga Tempat Tahanan Perlindungan Taiping, it is an undeniable fact that the applicants were allowed to have consultations with their counsel with the presence of officer from the center. There is also evidence to suggest that such consultations were either made in groups or individually. The record of visits as shown in exh 'ABM 1' to the affidavit of Ab Basir bin Mohamad (encl 6) is clearly indicative of this fact.

A The issue before me is whether r 81(5) of the Rules is ultra vires art 5(3) of the Constitution. In determining the issue it is of utmost importance to ascertain whether the rights of the applicants under art 5(3) has been breached. Article 5(3) of the Constitution provides:

> B When a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

It has been urged before me that the above provision of the Constitution in particular the word 'consult' must be liberally interpreted and be given a broad meaning in line with the Court of Appeal's decision in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261. In C essence, the applicants are complaining that they have not been given the right to consult their counsel in private and not on the denial of right to consult per se. On the facts before me and on the affidavit evidence produced, I found it hard to discern as to how the above provision of the Constitution has been breached. From the exh 'ABM 1' to the affidavit in D encl 6, I found that numerous consultations were accorded to the applicants with their respective counsels. I shall postulate those facts and instances as below:

(1) The respondent's reply in encl 6 indicating that consultation in groups were accorded to the applicants' as exhibited at p 71 of encl 4, the E joint affidavit of the applicants.

(2) Exhibit ME 3 at p 62 of encl 4, a letter from the applicants' solicitors to the Pegawai Yang Menjaga Tempat Tahanan Perlindungan Taiping acknowledging communication in private between the solicitors and their clients.

F (3) Exhibit 'ABM 1' in encl 6 indicating that no less than 35 lawyers were accorded visitation rights to have consultations with the applicants.

(4) Between 8 June 2001 and 17 April 2002, the dates indicated in the said exh 'ABM 1' there were 47 instances where consultations by the various lawyers from the various legal firms (eleven of them G altogether) with the applicants were recorded.

On my further perusal of exh 'ABM 1', it also indicates that on a certain day the applicants were allowed to have consultation with different counsels and at least on four different occasions the first, second and third applicants were allowed to consult different counsel either individually or in groups. In terms of the numbers of visits by counsel to the applicants, the same exhibit H further reveals that the first applicant had 38 visits, the second applicant had 40, the third applicant, 28, the fourth applicant, 30 and the fifth applicant had 26 visits between 8 June 2001 and 17 April 2002. All these exhibits were made by the applicants' counsels. On those facts alone can one say that the applicants rights under art 5(3) has been violated?

I In determining whether r 81(5) has violated art 5(3), I find comfort in citing our Supreme Court case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 where the court adopted the

test propounded by the Indian Supreme Court case of *Smt Maneka Ghandi v Union of India* AIR 1978 SC 597. At p 712, Abdul Hamid Omar LP said: A

> We share Dr Anand's view taken from the Supreme Court decision in *Smt Maneka Ghandi*'s case, that in testing the validity of State action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory'. B

On the facts and circumstances of the case presented before me, I find no justification in holding that the right to consult their legal advisers has been made ineffective or illusory. Considering the numerous occasions of consultation that has been accorded to the applicants and the battery of lawyers representing and coming in and out of the detention center seeking appointments with them merely point to the fact that the applicants were actually pursuing their fundamental rights in accordance with the said art 5(3). C

Having regard to the facts adumbrated above, there certainly can be no denial of the fact that the applicants were never denied of their right to D consult a legal practitioner of their choice. Up to this point, I am not satisfied that there is evidence to indicate that the respondents has breached art 5(3). In *Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293, the Supreme Court said (at pp 297–298):

> When should a detainee arrested under s 75 of the Internal Security Act be E allowed to exercise his right under art 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v Officer-in-Charge Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198. In other words the matter should best be kept to the good judgment of the authority as and when such right not interfere with police investigation. *To show breach of art 5(3) an applicant has to show that the police* F *has deliberately and with bad faith obstructed a detainee from exercising his right under the article.* (Emphasis added.)

Applying the above test on the breach of art 5(3), I am of the considered view that the applicants has failed to show that the respondents had deliberately and in bad faith obstructed them from exercising their rights under the article. On the contrary, the respondents by being present in sight G and hearing during the visits to the detainee at the detention center are merely exercising their statutory duty as provided for in the rules.

For such consultations to be effective, it is submitted by the applicants that it must be free from any form of interference and restrictions. In the instant case, it is contended that consultation with the presence and within H the hearing of the officers from the detention center makes such right illusory. In support of such contention, the case of *Moti Bai v The State* AIR 1954 Rajasthan 241 was referred to where the provision of art 22(1) of the Indian Constitution which have the same effect as our art 5(3) were in issue. In my view, after having considered the list of authorities on the application of art 5(3) of the Constitution, there is a consensus of view that the right to I consult a legal practitioner is subject to certain legitimate restrictions (see *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30, *Ramli bin Salleh v*

Inspector Yahya bin Hashim [1973] 1 MLJ 54 and *Theresa Lim Chin Chin & Ors v Inspector General of Police*). In *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, Suffian LP observed the following (at p 200):

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest .... A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public .... The interest of justice is as important as the interest of the arrested persons ... .

His Lordship further referred and concurred with the view of Blide J in *Sundar Singh v Emperor* AIR 1930 Lahore 945 who said at p 947:

> The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation.

Still on the issue of legitimate restriction, the House of Lords in *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 had this to say at p 437:

> Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privileges. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

In my view the provisions of r 81(5) of the Rules is couched in the form of certain curtailment to the right to communicate confidentially with a legal adviser and they are fashioned in clear and express words. As suggested in the earlier part of my judgment, the right of a detainee under art 5(3) is not without restrictions and such restrictions are made and only deemed necessary in balancing between the interest of the detainee and the interest of justice and to the public. Lest one forget, it must always be borne in mind that justice does not mean only for the accused, it also means the interest of the State. As Raja Azlan Shah FJ (as His Majesty then was) in *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116 at p 118:

> We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the State, and not enough is paid to the interests of the State.

Echoing those words, I am of the view that the codification of the rule in the style of r 81(5) of the Rules is one such means where the interest of the State is given due consideration in relation to those accused and deemed to be a threat to the security of the nation.

Another aspect which merits consideration of this court touches on the issue involving the interpretation of the said rule. In construing r 81(5), this

court should not go further than what was said by Raja Azlan Shah FJ (as His Majesty then was) in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187. Speaking for the Federal Court at p 188 it was stated:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter the political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at p 118:
>
> > 'Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.'

Following those words, it is certainly outside the purview of my power to consider the harshness or the unjustness of the provisions of r 81(5) of the Rules. It serves no purpose for this court to embark on such an adventure and most of all I am not competent to dwell on the subject matter. It must also be noted that r 81 is made under the provisions of s 8(4) of the Internal Security Act 1960 'for the discipline and interest of persons detained therein' and the Minister is empowered 'to make different rules for different places of detention'. It seems clear to me that by those provisions, a certain degree of justification is emplaced with the authorities in coming up with different set of rules for different places of detention and in my view too different considerations must also have been considered by the authorities in framing r 81. Again it is outside the purview of my powers to cavil at those justifications or considerations.

In the course of the submissions by both counsels in this matter, I was invited to have regard to international standards in determining the scope and extent of art 5(3). My attention was specifically drawn to principle 18 in the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', a document adopted by the United Nations General Assembly which provides as follows:

> Principle 18
>
> 1 A detained or imprisoned person shall be entitled to communication and consult with his legal counsel.
>
> 2 A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
>
> 3 The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

A

4 Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing of a law enforcement official.

5 Communication between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

B

In my opinion, such principles are only declaratory in nature and I find comfort in sharing the same views as expressed by Siti Norma Yaacob FCJ in the case of:

C

(1) *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449;

(2) *Raja Petra bin Raja Kamarudin v Ketua Polis Negara, Mahkamah Persekutuan* (Bidang Kuasa Jenayah) Bil 05–9–2001 (W);

(3) *Chua Tian Chang v Ketua Polis Negara, Mahkamah Persekutuan* (Bidang Kuasa Jenayah) Bil 05–10–2001 (W);

D

(4) *Hishamudin bin Rais v Ketua Polis Negara, Mahkamah Persekutuan* (Bidang Kuasa Jenayah) Bil 05–11–2001 (W);

(5) *Saari bin Sungib v Ketua Polis Negara, Mahkamah Persekutuan* (Bidang Kuasa Jenayah) Bil 05–12–2001 (W);

E where it was stated (at p 514):

> Since such principles are only declaratory in nature, they do not, I consider, have the force of law or binding on member States. If the United Nations wanted those principles to be more than declaratory, they could have embodied them in a convention or a treaty to which member States can ratify or accede to and those principles will then have the force of law.

F

Much earlier, the international standards as set by the 1948 Declaration was described as a non legally binding instrument and merely a statement of principles devoid of any obligatory character and is not part of our municipal law in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356. In any event, it is also a recognized standard that certain

G instructions and even suspension of such right may be imposed in certain circumstances to be specified by law or lawful regulations when it is considered indispensable by a judicial or other authority in order to maintain security and good order (principle 18(3)) and I find that r 81(5) is in accord with this principle. On those authorities, I consider that the

H argument on whether r 81 is in accord with the principles stated above is purely academic and merits no further deliberation.

For the reasons stated above, I dismiss the application.

Application dismissed.

I Reported by Lim Lee Na